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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1951

No. 520

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Petitioner-Appellant,

vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY,
Defendant-Respondent.

On Appeal from the Supreme Court of New Jersey

PETITION FOR REHEARING

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, petitioner-appellant, prays that this Court grant rehearing of its order of March 3, 1952, dismissing the appeal for want of a substantial Federal question, and that the Court note jurisdiction in the above entitled case, as prayed for in the Petition of Appeal filed herein on December 18, 1951 and the moving papers thereon.

REASONS FOR GRANTING REHEARING AND NOTING JURISDICTION

POINT I

The order of dismissal in No. 520 is in conflict with *Standard Oil Co.* v. *Peck*, No. 184, 20 U. S. L. W. 4113 (Feb. 4, 1952).

The order of the Court dismissing the appeal in No. 520 is startling in view of the Court's action one month earlier in declaring invalid the Ohio tax upon boats and barges in *Standard Oil* v. *Peck*. This Court held that the boats could not be taxed at their full value for the reason that the evidence established that the boats spend most of their time outside of Ohio. We quote the following from the opinion itself:

> "* * * there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits or protection which the taxing state gives those operations."

That case is identical in principle with No. 520. The evidence clearly shows that The Central Railroad Company of New Jersey earns no net railway operating income within the State of New Jersey while its subsidiary, The Central Railroad Company of Pennsylvania, earns income from activities carried on wholly within Pennsylvania. This is shown by minute and detailed operating records kept by the appellant and its subsidiary, in conformity with the practices established by the Interstate Commerce Commission. The accuracy and honesty of these records in fairly apportioning income to the state in which it is actually earned is eloquently established by the fact that the *gross* operating income of the two roads is divided by the operating accounts in the same

proportions which the State of New Jersey claims should be applied to the net. At the same time, an analysis of the operating expenditures of the two roads shows that the deficit attributable to New Jersey results entirely from costs and taxes which are entirely local and which could not, under any rational system, be chargeable against operations carried on in Pennsylvania. As was pointed out in Appellant's brief, the State of Pennsylvania would have a perfect right to tax the entire net railway operating income of the CRP. Under the decision of this Court, the State of New Jersey is also permitted to tax 67% of that net railway operating income. The effect of the decision of this Court in No. 520 is to permit "multiple taxation of interstate operations", and a tax which has "no relation to the opportunities, benefits or protection which the taxing state gives those operations."

POINT II

The dismissal of the appeal in No. 520 is all the more startling because it clearly overrules, *sub silentio*, earlier and well established decisions of this Court.

We refer to *Southern Railway Co.* v. *Kentucky*, 274 U. S. 76 (1926), and *Norfolk & Western Railway Co.* v. *North Carolina*, 297 U. S. 682 (1935), where this Court held that a state franchise tax on an interstate railroad measured by its net railway operating income allocated to the taxing state on the basis of a mileage formula is invalid where the formula, while not arbitrary on its face or in its general operation, is unworkable or unfair when applied to a particular railway in particular conditions.

That we have in this case just such a situation is demonstrable beyond any doubt. The separate operating accounts maintained by the appellant with respect to its

operations in New Jersey, pursuant to Interstate Commerce Commission standards, show that in each of the tax years in question there was a loss running to millions of dollars on the operations in New Jersey, and that absolutely every penny of the operating income of the so-called "system" arose from the operation in Pennsylvania. This is precisely the sort of unfairness this Court adverted to in the *Southern Railway* case and in the *Norfolk & Western Railway* case as invalidating such state taxation as applied to a particular railway in particular conditions.

We cannot see any significant factual difference between this case and the *Southern Railway* case and the *Norfolk & Western Railway* case, and we do not believe it was the intention of the majority of the Court in this case to overrule, *sub silentio*, these important and well-known cases by their vote to dismiss this appeal.

POINT III

The order of dismissal in No. 520 suggests that this Court applied to the case the principles governing petitions for certiorari rather than the principles governing appeals as of right.

The present appeal was evidently dismissed under the provision of Rule 12 which requires that the appellant present a substantial Federal question. In the case of failure to present a substantial question, the decisions of this Court indicate that the dismissal may legitimately be based upon one of two considerations. The first is that the questions presented are so explicitly foreclosed by prior adjudications as to be capable of determination without extended argument. That criterion could obviously not have been the basis for this decision since it would be totally inapplicable. Appellant does not come here upon a purely legal proposition. Rather, appellant comes here

insisting that certain well-settled principles concerning the power of a state to tax extra-state activities be applied to the particular facts here presented. As this Court itself has said in *Freeman* v. *Hewit*, 329 U. S. 249, at 252 (1946):

> "* * * especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts."

The second basis for dismissing an appeal as insubstantial is that the "asserted right is so wanting in foundation and insubstantial as to be devoid of all merit and frivolous." *Seaboard Air Line Railway* v. *Padgett*, 236 U. S. 668, at 671 (1915). And see *Wabash R. R. Co.* v. *Flannagan*, 192 U. S. 29, at 38 (1904). Appellant has reexamined the record in the light of this principle and is honestly unable to conclude that the Federal right set up is frivolous. On the contrary, the evidential facts, which have been detailed in Point I, make a very strong case. Perhaps the short answer to the charge of frivolity is that one-third of the membership of this Court have voted for the acceptance of jurisdiction.

Appellant is, therefore, reluctantly led to the conclusion that the appeal has been dismissed because the majority of the Court are of the opinion that the case is important only to these litigants and does not present an appropriate opportunity for the enunciation of general principles capable of settling the course of future litigation between other parties. In other words, appellant concludes that this Court, in violation of the statutory mandate and in violation of its own rules, has treated the present Appeal as though it were a Petition for Certiorari.

The Court is, of course, aware that in the minds of some students of its work there exists the suspicion that for every practical purpose the two procedures have been merged and that this Court consistently disposes of appeal cases more in the light of their capacity as vehicles for

enunciating general principles and laying general controversies to rest than in the light of the meritorious rights of the parties involved. See, *e. g.*, Ulman and Spears, *Dismissed for Want of a Substantial Federal Question*, 20 B. U. L. Rev. 501, 529 (1940); Note, *The Insubstantial Federal Question*, 62 Harv. L. Rev. 488 (1949). It is quite obvious that there is no explicit sanction for such a policy in either the Judicial Code or the Rules of this Court. What is more, the history of the Judiciary Act of 1925, which delineated the jurisdiction of this Court in substantially its present form, affirmatively shows that this intermingling of the purposes of Appellate and Certiorari jurisdiction was not intended to occur.

It is matter of common knowledge that Chief Justice Taft heartily desired the abolition of the mandatory jurisdiction, it being his thought that the discretionary jurisdiction ought to extend to all cases arising in state courts. It was his position that the Court ought to relinquish its function as the vindicator of federal rights as such, but should stand merely as the guardian of the Constitution—so to speak, as a third house of the legislature. It is worthy of note that, notwithstanding the great prestige of the Chief Justice, no such provision was included even in the so-called "Judges Bill" upon which the 1925 Act was based. For the history of the Act of 1925 see Frankfurter and Landis, *Business of the Supreme Court*, Chapter 7 (1928).

That the policy of treating mandatory appeals as though they were petitions for Certiorari has been instituted without Congressional authority raises a very serious danger to the position of the Court. So long as this Court is by statute required to sit as the arbiter of purely private rights, so long as the statute tells the nation that it may look to this Court for the protection of federal rights when they are trampled by a state statute, the standing of this Court requires that that duty be

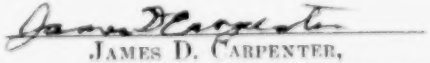
fully discharged. The original purpose of the mandatory jurisdiction in appeals from state courts was to prevent the discontents arising from the danger that state courts would be more jealous of local rights than of federal claims. That danger was real in 1789; and, as is shown by the decisions of this Court in *Standard Oil Co.* v. *Peck*, *supra*, and *Memphis Steam Laundry* v. *Stone*, 20 U. S. L. W. 4162, that danger is real in the month of March, 1952. To a very great extent, the enjoyment of rights granted by the Constitution of the United States, and the widespread national adherence to that Constitution, depend upon the power and willingness of this Court to speak out whenever an appellant comes before it with evidence of a probable infringement of his rights. It is not enough to speak out merely on questions which are interesting, or on questions which are unsettled, or on questions which the Court believes to represent a pattern in litigation. The statute requires that this Court will exercise its mandatory jurisdiction to protect federal rights *whenever* they are violated by a statute of a state.

CONCLUSION

For all of the foregoing reasons appellant respectfully urges that this Court recall its mandate in No. 520, and that the case be restored to the docket to the end that it may be fully heard and determined.

Dated: March 17, 1952.

Respectfully submitted,



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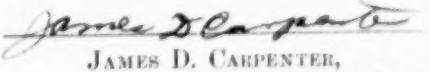
CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.



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